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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR., PETITIONER

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether a veteran who, after his return to private employment from military service and upon his completion of the qualifying requirements fixed by the applicable collective bargaining agreement, is promoted to a higher job, possesses a statutory entitlement to seniority in that job from the date upon which he would have completed the requirements and would have been promoted had he not entered the military

service. The position of the petitioner veteran is that, under the provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U. S. C. App. (1946 ed.) 308, the answer to the question is in the affirmative. The court below, however, has held that, by computing petitioner's seniority from the date upon which, because of his absence in the military service, he actually completed the qualifying requirements, the respondent employer has complied with the mandate of the Act. 211 F. 2d 95.

In both courts below, petitioner was represented at his request by the Government.[1] Following the determination of the Court of Appeals, he was advised that, after further study, the Solicitor General deemed it inappropriate to file a petition for a writ of certiorari. On July 29, 1954, a petition for certiorari was filed on his behalf by private counsel. On October 25, 1954, the petition was granted. 348 U. S. 860.

The Solicitor General's decision not to seek review by this Court was motivated neither by the belief that the question presented lacked sufficient importance to warrant such review nor by doubt in respect to the merit of petitioner's position. The Department of Justice has consistently regarded petitioner's view as to the scope of the protection afforded the returning veteran by Section 8 of the

[1] Section 8(c) of the Selective Training and Service Act (50 U.S.C. App. (1946 ed.) 308c) authorizes the United States Attorney to represent the veteran in judicial proceedings to obtain employer compliance with the provisions of the Act.

Selective Training and Service Act, as that Section has been interpreted by this Court,[2] to be wholly correct and has urged it upon the lower courts—albeit unsuccessfully—in several other cases on behalf of veterans in like circumstances. See *e. g. Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903; *Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 204 F. 2d 340 (C.A. 5); *Bostian* v. *Seaboard Airline R. Co.*, 211 F. 2d 867 (C.A. 4). It was solely because of the denial of the petition for certiorari filed by the Government in *Gregory*, and the absence of a subsequent conflict between the circuits,[3] that we believed there to be no hope of a successful petition in the instant case. Now that certiorari has been granted, it is appropriate for the Government to present, briefly and summarily, its views in support of the petitioner.[4]

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[2] *Oakley* v. *Louisville & N. R. Co.*, 338 U.S. 278. See also *Fishgold* v. *Sullivan Dry Dock and Repair Corp.*, 328 U.S. 275; *Trailmobile Co.* v. *Whirls*, 331 U.S. 40. See n. 5, *infra*, p. 5.

[3] Several pre-*Gregory* Court of Appeals decisions, however, appear in conflict with the determination below. See *e.g.*, *Morris* v. *Chesapeake & O. Ry Co.*, 171 F. 2d 579 (C.A. 7), certiorari denied, 336 U.S. 967; *Spearmon* v. *Thompson*, 167 F. 2d 626 (C.A. 8), certiorari denied *sub nom. Delozier* v. *Thompson*, 335 U.S. 886.

[4] The Government's vital interest in the strict observance of the veterans' statutory reemployment rights needs little elaboration. The wholehearted acceptance by the citizen of his obligation to render military service is more readily forthcoming in circumstances where he is secure in the knowledge that he will not be placed at a disadvantage in his civilian employment by reason of such service. This consideration undoubtedly influenced the Congressional decision to permit representation of the veteran by the Department of Justice. See n. 1, *supra*, p. 2.

SUMMARY OF ARGUMENT

As the Court of Appeals appears to concede, its determination as to the scope of petitioner's reemployment rights guaranteed by the Selective Training and Service Act runs counter to the interpretation given Section 8(c) of the Act by this Court in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, *i. e.*, that the veteran must be restored to the position he would have held if he had remained continuously in his civilian employment. This interpretation, which was expressly affirmed by Congress in later acts, is clearly correct and governs this case. The judgment below should therefore be reversed.

ARGUMENT

1. Section 8(*c*) of the Selective Service and Training Act, 50 U. S. C. App. (1946 ed.) 308(c), requires that the returning veteran be restored to his job "without loss of seniority". In *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, the most recent decision of this Court under the Act, it was squarely held [338 U. S. at 283] that this means that the veteran is entitled to restoration:

> not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable *to the position which he would have held if he had remained*

continuously in his civilian employment. [Emphasis added][5]

And this so-called "escalator principle" was expressly reaffirmed by Congress in Section 9(c)(2) of the Selective Service Act of 1948, 62 Stat. 604, 615, 50 U.S.C. App. 459(c)(2).[6]

The court below recognized, as it was compelled

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[5] This holding, which was reiterated, in slightly differing words, six times in the *Oakley* opinion [338 U.S. at 279, 282, 283, 284, 285], followed logically from the Court's earlier decisions in the *Fishgold* and *Trailmobile* cases, *supra*. In *Fishgold*, the Court noted [328 U.S. at 284] that the Act was designed to insure that the employee "who was called to the colors [would not] be penalized on his return by reason of his absence from his civilian job" and further [328 U.S. at 288] that "Congress recognized in the Act the existence of seniority systems and seniority rights" and "sought to preserve the veteran's rights under those systems and to protect him against loss by reason of his absence". In *Trailmobile*, it was again stated [331 U.S. at 58] that the "restored veteran * * * could not be disadvantaged by his service to the nation" and was not to be penalized on his return because of his absence from his civilian job. See also *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 529.

[6] Section 9(c)(1) of the Selective Service Act of 1948, 50 U.S.C. App. 459(c)(1), is identical with Section 8(c) of the 1940 Act. Section 9(c)(2) provides that:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

In 1951, the 1948 Act was continued as the Universal Military Training and Service Act, 65 Stat. 75.

to, that had petitioner remained continuously in the employ of the respondent railroad, he would have completed 1160 days service as a temporary car-man mechanic on June 1, 1946, and, under the collective bargaining agreement pertaining to his craft, would have been promoted on that date to a permanent car-man mechanic position. Nevertheless, the court determined that petitioner was entitled to seniority as a mechanic only from January 10, 1949, the date on which, because of his period of service in the armed forces, he actually obtained the requisite on-the-job experience. This holding has the conceded consequence of subordinating petitioner on the applicable seniority roster to the four non-veteran intervening defendants, all of whom had remained in the continuous employ of the railroad and had completed 1160 days of work as temporary mechanics prior to January 10, 1949, but subsequent to June 1, 1946.

The justification advanced by the Court of Appeals for its rejection of the "continuous employment" test laid down in *Oakley* and carried over into the Selective Service Act of 1948 was that that test conflicts with the provision in Section 8(c) [50 U.S.C. App. (1946 ed.) 308(c)] that the returning veteran "shall be considered as having been on furlough or leave of absence." Finding this purported conflict to be irreconcilable, the court ruled that the "furlough or leave" clause must govern [211 F. 2d at 99]. Since petitioner had been accorded the same seniority on the me-

chanic's roster as he would have been given under the collective bargaining agreement had he been on an ordinary leave of absence instead of in military service, the court reasoned that the requirements of the statute had been fulfilled [211 F. 2d at 99-100].

The fundamental error in this theory is amply demonstrated by petitioner's examination of the structure and legislative history of the Act (Pet. Br. pp. 14-21). Without repeating here the content of that examination, we think it leads inescapably to petitioner's conclusion that the "furlough or leave" clause was not intended to operate as a restriction on the right conferred upon the employee by the Congress to be restored "without loss of seniority"; and, further, that a reasonable reading of Section 8(c) prohibits such operation. The language of the Section, taken as a whole, makes it plain that its several clauses are to be considered as cumulative and not as limitations upon one another. And equally plain from the legislative history is that the purpose of the "furlough or leave" clause was not to prevent the application of the "escalator principle" in these circumstances, but rather was, as petitioner suggests, to provide further protection to the returning veteran against being placed at a disadvantage because of his military service.[7]

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[7] These conclusions are buttressed, we believe, by the fact that in the Selective Service Act of 1948 Congress both carried over the "furlough or leave" clause and expressly adopted the "continuous employment" test. Cf. n. 6, *supra*, p. 5.

2. It is important to note, we believe, that petitioner's construction of the statute does not have the effect of destroying or undermining the seniority system created by the railroad and the union. Petitioner takes that system as it exists—subject simply to the condition, set forth in the statute, that the rules of the system be applied to him as they would have been applied had not military service intervened. And this approach, *i.e.* reading together the seniority provisions of collective bargaining agreements and those of the Act, is neither new nor unusual. As petitioner observes (Pet. Br., p. 10, fn. 3), the agreements between unions and a number of the other major railroads in the country contain provisions requiring the employer to compute the seniority of an employee in this situation in the precise fashion petitioner would have the respondent compute his seniority.[8] Similar agreements are to be found in the oil industry, the automobile industry, and the steel industry.

The sound basis for the preservation of reemployment rights in the manner provided by these

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And, while the instant action is governed by the Selective Service and Training Act of 1940, the court below properly conceded [211 F. 2d at 98] that Congress did not intend the measure of the veterans' rights under that Act to be any different. This concession forced the court to find a conflict not only between *Oakley* and Section 8(c) of the 1940 Act, but additionally between Sections 9(c)(1) and 9(c)(2) of the 1948 Act.

[8] While these agreements are not in the record below, they are on file as a matter of public record with the National Mediation Board, as is required by Section 5, third (e), of the Railway Labor Act, 48 Stat. 1195, as amended, 45 U.S.C. 155.

agreements is revealed by a consideration of the irrevocable effect which results from any loss of standing. Seniority provisions were developed in the collective bargaining process to provide employees with maximum security and certainty as to their relative position in their employment relationship. While the objective standard provided by an employee's seniority or length of service is used most frequently in determining the order of layoff [9] and rehiring, it has also been commonly used to avoid favoritism, discrimination, and arbitrary action with regard to promotions, transfers to more desirable duties or to better machines, the choice of shifts, the choice of vacation time, selection for overtime work, and other matters which are generally considered as presenting alternatives of varying desirability. *Collective Bargaining Provisions,* U. S. Bureau of Labor Statistics Bull. No. 907, c. 2, p. 73 (1948); *Union Agreement Provisions,* U. S. Bureau of Labor Statistics Bull. No. 686, 117, 125-137 (1942); Greenman, *Getting Along with Unions,* 25-26 (1948); Williamson & Harris, *Trends in Collective Bargaining,* 100 (1945); The Twentieth Century Fund, *How Collective Bargaining Works,* 29 (1942). And although seniority rights thus may be inchoate in the sense that they

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[9] A common feature of seniority clauses governing layoffs is the "bumping" privilege, which entitles an employee with greater seniority to "bump" a junior from a lower position for which the senior employee is qualified. *Collective Bargaining Provisions, infra,* c. 1, p. 18; *Union Agreement Provisions, infra,* 130.

become effective only upon the happening of certain events (*e.g.*, the occurrence of a vacancy on a more desirable shift) this hardly affects their value to the employee or makes them less real than an unconditional right when the contingency materializes.

CONCLUSION

For the above reasons, we urge this Court to reverse the judgment below.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General,

WARREN E. BURGER,
Assistant Attorney General,

SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
Attorneys.

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